a

ASIA COMMERCIAL FINANCE (M) BERHAD

v.

KALINE HOLDINGS SDN. BHD. & 4 ORS. AND KALINE HOLDINGS SDN. BHD. & 2 ORS, THIRD PARTIES

b

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[SUIT NO. 7-17 OF 1991]
4 JULY 1994

c

PRACTICE & PROCEDURE: Application by 2nd defendant for indemnity from 4th and 5th defendants/3rd parties - 2nd, 4th and 5th defendants directors of 1st defendant company - 2nd, 4th and 5th defendants guarantors for loan obtained by 1st defendant from plaintiffs - 2nd defendant selling shares in 1st defendant to 4th and 5th defendants - 4th and 5th defendants agreeing to indemnify 2nd defendant against all liabilities while 2nd defendant still a director of 1st defendant - 1st defendant unable to repay loan - Writ issued against guarantors - Summary judgment obtained against 2nd defendant - 2nd defendant taking out 3rd party notice against 1st, 4th and 5th defendants - Contention that indemnity sued upon was also subject-matter of another suit which should be consolidated - Whether subject- matter of other suit relevant to present proceedings - Whether decision of Court in the present suit will prejudice other suit.

d

PRACTICE & PROCEDURE: Whether 2nd defendant's claim was for indemnity or contribution from co-sureties - Whether 2nd defendant was entitled to a declaration that 4th and 5th defendants do pay the plaintiffs the debt due under the judgment directly or through the 2nd defendant - Validity of the 3rd party notice - Whether the 3rd party notice ought to have been served on 4th and 5th defendants before judgment was entered against 2nd defendant - Whether 3rd party notice can be equated to a writ with validity of 12 months - Consideration of O. 6 r. 6(3), 7(1), O. 10, O. 11, O. 12, O. 16 rr. 3(3)(a), 4(3)(c), O. 70 r. 3 RHC 1980.

e

This was an application by the 2nd defendant against the 4th and 5th defendants/3rd parties for indemnity and costs.

The 2nd, 4th and 5th defendants were directors of the 1st defendant company. The company obtained a loan from the plaintiff which was guaranteed by the 2nd, 4th and 5th defendants and another director. The 2nd defendant entered into an agreement to sell his shares in the company
f to the 4th and 5th defendants who undertook to indemnify the 2nd defendant against all liabilities under the guarantee signed by the 2nd defendant as a director of the company. Upon the company's failure to repay the loan the plaintiffs issued a writ against the company and the guarantors. On 24 March 1992 the 2nd defendant took out a 3rd party notice against the company and the 4th and 5th defendants which was served on 23 March 1994. Final judgment was entered for the plaintiffs against the company and the 4th and 5th defendants on 8 April 1992 and summary judgment was entered against the 2nd defendant and the other director on
g 3 August 1992.

Counsel for the 4th and 5th defendants submitted that the indemnity sued upon was also the subject-matter of another suit in which the 2nd defendant was suing the 4th and 5th defendants and the two cases ought to be consolidated. He claimed that a decision by the Court in the matter at hand would prejudice the issues in the other suit. Counsel also claimed that the 2nd defendant's claim was for contribution against the co-sureties which the 2nd defendant could
h not claim until he had paid his share of the debt which he had not. It was further contended that the duration of the 3rd party notice, which was likened to a writ of summons, was only 12 months and since it had not been renewed it had expired almost a year before it was served. Counsel for the 2nd defendant on the other hand contended that the subject-matter of the claim in the other suit was not relevant to the present proceedings. He argued that even though the 2nd defendant had not paid the principal debtor he was nevertheless entitled to the orders to compel the 4th and 5th defendants to pay either to the plaintiffs directly or through the 2nd defendant.

i

Counsel further argued that there was no limit to the duration of the 3rd party notice which could be served at any time after it was issued.

Held:

[1] In the other suit, the 2nd defendant claimed the balance of the purchase price of the shares from the 4th and 5th defendants under five agreements, one of which was the agreement containing the indemnity relied on by the 2nd defendant in the present proceedings. How then could the subject-matter of that suit be in any way relevant to the issue in the present case which was the indemnity which the 4th and 5th defendants had promised the 2nd defendant. As the validity of the indemnity agreement was not in dispute, there was therefore no substance in the contention that what the Court decides in the present proceedings may prejudice the issues in the other suit.

[2] The 2nd defendant's claim was not for contribution but for a complete indemnity under the undisputed agreement. As between the 2nd defendant and the 4th and 5th defendants, the indemnity had the effect of making the 4th and 5th defendants the principal debtor and the 2nd defendant the surety in respect of the amount due under the judgment obtained by the plaintiffs against the 2nd defendant.

[3] The 2nd defendant was entitled to a declaration that the 4th and 5th defendants pay the plaintiffs the debt due under the judgment but the Court was unable to accede to the prayer that the 4th and 5th defendants pay the money due under the judgment to the 2nd defendant for transmission to the plaintiffs as there was no law to allow such an order.

[4] The 3rd party notice ought to have been served before judgment was entered against the 2nd defendant so that the question of the validity of the claim of the plaintiffs against the 2nd defendant, if contested by the 4th and 5th defendants, could be litigated in one and the same action by the giving of the necessary 3rd party directions. Since judgment was entered by the plaintiffs against the 2nd defendant before he served the 3rd party notice on the 4th and 5th defendants, it meant that the 4th and 5th defendants and the 2nd defendant could still relitigate the validity of the plaintiffs' claim against the 2nd defendant which was what 3rd party proceedings seek to avoid.

[5] If the words "the third party notice were a writ" in O. 16 r. 3(3) were intended to have the effect of turning a 3rd party notice into a writ and thus make all the provisions, including the 12 months validity period applicable to a 3rd party notice, O. 16 r. 3 would not have been worded to say that only O. 6 r. 6(3) should apply instead of all the rules of O. 6. By expressly providing r. 6(3) of O. 6 only to apply, it must have been intended that the rest of the rules of O.6 are not to apply. In this regard, the 3rd party notice was a writ only for the purposes of being assigned a serial number, of being sealed and dated in so far as the application of O. 6 r. 6(3) was concerned. The words of O. 16 r. 3 must be taken to be used correctly and exactly with the result that only the provisions of r. 6(3) and no other rules of O. 6 apply. Therefore the 12 months validity period prescribed by O. 6 r. 7(1) had no application to a 3rd party notice which means that a 3rd party notice had no period to limit its validity.

[4th and 5th defendants to indemnify 2nd defendant by direct payment of the judgment sum to the plaintiffs. Indemnity for costs disallowed. Costs to the 2nd defendant to be taxed].

Cases referred to:

Bank Bumiputra Malaysia Berhad v. Darnaz Enterprise Sdn. Bhd. & Ors. [1986] 2 MLJ 222 ***(dist)***
Si Khiong Industries Sdn. Bhd. v. Liau Shu Chau (trading as Syarikat Maju Jaya Agency) [1993] 1 AMR 9:779; [1993] 4 CLJ 468 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 6, rr. 6(3) 7(1), O. 10, O. 11, O. 12, O. 16 rr. 3(3) (a), 4(3) (c), O. 70 r. 3

For the 2nd defendant - Ting E. Hang; M/s. Ting & Co.
For the 4th & 5th defendants and third parties - Roland Cheng; M/s. Roland Cheng & Co.

JUDGMENT

Ian H.C. Chin J:

This an application by Chua Chun Eng ("Chua"), the 2nd defendant in the above-named suit, for various orders or judgments against two third parties, Kua Nam Kiang ("Kua") and Siau Fung Oi ("Siau") who are respectively the 4th and 5th defendants in the said suit. Chua by a summons in chambers taken out on 27 May 1994 asks for the following orders:

(1) that Kua and Siau indemnify him against the claim of Asia Commercial Finance (M) Berhad ("the plaintiffs") by paying to him for transmission to the plaintiffs the amount due under a judgment dated 3 August 1992 for RM4,497,538.41, interest and costs; and

(2) that Kua and Siau pay him the costs in defending the suit against the plaintiffs and the costs of this application.

The history and the undisputed facts of the matter herein have to be related. Chua, Kua and Siau were all at one time fellow directors of Kaline Holdings Sdn. Bhd. ("the company"). The company borrowed from the plaintiffs and the loan was on 24 October 1988 guaranteed by Chua, Kua and Siau together with another director Lee Li Fong ("Lee"). On 14 April 1989 Chua entered into an agreement with Kua and Siau whereby he sold all his shares in the Company to Kua and Siau and one of the terms of the agreement is clause 8 which reads:

> 8. [Kua and Siau] shall hereby undertake with [Chua] that they will indemnify and keep [Chua] indemnified against all liabilities under whatever letters of guarantee signed by [Chua] as a director of the Company prior to this agreement and that [Chua] shall be released of all such guarantee from the date hereof.

The company could not repay the loan and the writ herein was on 11 March 1991 taken out by the plaintiffs against the company as the borrower and against Chua, Kua, Siau and Lee as guarantors to recover the debt due and this guarantee is the one referred to in clause 8 *(supra)*. The writ against Chua was served on him on 14 February 1992. Chua and Lee, thereafter, on 24 March 1992, took out the third party notice against the company, Kua and Siau. On 8 April 1992, the Court ordered final judgment to be entered for the plaintiffs against the company, Kua and Siau. Chua and Lee on 10 April 1992 filed their defence against the claim of the plaintiffs. On 20 April 1992, the plaintiffs took out an application for summary judgment against Chua and Lee and the Court on 3 August 1992 ordered judgment to be entered for the plaintiffs against Chua and Lee for the said sum, interest and costs.

The third party notice by Chua and Lee was only able to be served on Kua and Siau on 23 March 1994. On 14 April 1994, Chua and Lee took out a summons for third party directions and the pleadings were, *inter alia*, ordered to be delivered. The parties then served their respective pleadings.

Chua's application for summary judgment against Kua and Siau, which was supported by his affidavit affirmed on 11 May 1994, was argued on 27 June 1994. Mr. Roland Cheng, Counsel for Kua and Siau, filed an affidavit on their behalf to oppose the application. Since the existence of the agreement and the indemnity therein contained relied on by Chua to seek indemnity from Kua and Siau is not in dispute, I ask Mr. Roland Cheng to address the Court first as to why judgment should not be entered as prayed by Chua.

The first of the arguments canvassed by Mr. Roland Cheng is that the indemnity sued upon is also the subject-matter of another suit, Suit No. T(22) - 84 of 1992, in which Chua is suing Kua and Siau, and there are "common areas of fact between the two cases and it would be in the interests of justice for the two cases to be consolidated and tried as one case". Mr. Roland Cheng argued that the Court should not deal with the application now. Mr. Ting E. Hang, Counsel for Chua, replied and said that the subject-matter of the claim in the other suit is not relevant to the present proceedings. The Suit No. T(22) - 84 of 1992 will have now to be adverted to. In that

suit Chua claims against Kua and Siau RM1,912,500 being the balance of the purchase price in respect of the sale of shares by Chua to Kua and Siau under five agreements, one of which is the agreement containing the indemnity which is now relied on by Chua in the present proceedings. How, then, could a claim for the balance of the purchase price of shares, the subject-matter of that suit, be in any way relevant to the issue in our case, which is the indemnity which Kua and Siau had promised Chua. The only thing common to both is that both actions arose out of the said agreement containing the indemnity and which also contains the terms relating to the payment of the shares. The agreement is not disputed. Mr. Roland Cheng then ventured to say that a decision in the matter at hand "will prejudice" the issues in the other suit, to which I asked Mr. Roland Cheng what the matters are which this Court may prejudice. This is what Mr. Roland Cheng said in answer:

> Ruling that indemnity in agreement is valid. We are not disputing validity. 4th and 5th defendants are saying indemnity was only given on certain conditions - Australian indemnity should be used to off-set the Malaysian indemnity.

That is not much of an answer. He started of by saying that the decision on the validity of the indemnity, if made in the present proceeding, will prejudice the other suit but, in the next breath, he says the validity of the indemnity agreement is not disputed. There is, therefore, no substance in the contention that what the Court decides in the present proceedings may prejudice the issues in the other suit. In any event, if what the Court decides in the present proceedings can effectively dispose of any other suits or of other issues in other suits, there is no reason why the Court should not do so. If it is felt that the two suits are in respect of the same subject-matter, there should have been an application to stay the one or the other and Chua be made to elect which of the two suits he wish to proceed. lt is not the case here because the two actions do not concern the same subject-matter.

The next argument against judgment being entered is anchored on the principles set out in the case of *Bank Bumiputra Malaysia Berhad v. Darnaz Enterprise Sdn. Bhd. & Ors.* [1986] 2 MLJ 222, which Mr. Roland Cheng cited. He argued that the claim by Chua against Kua and Siau is a claim for contribution against co-sureties and this, according to him, Chua cannot claim until Chua had paid more than his share of the debt which Chua had not. Mr. Roland Cheng had proceeded on the misconception that the claim of Chua is for contribution based on the equitable principle referred to in the case he had cited. But Chua's claim is not for contribution but for a complete indemnity under the undisputed indemnity agreement. The case cited by him is of no assistance to his case. As between Chua of the one side and Kua and Siau of the other, the indemnity has the effect of making Kua and Siau the principal debtor and Chua the surety in respect of the amount due under the judgment obtained by the plaintiffs against Chua. Mr. Ting E. Hang argued that even though Chua had not paid the principal debtor he is nevertheless entitled to the orders to compel Kua and Siau to pay either to the plaintiffs directly or through Chua. This Court in *Si Khiong Industries Sdn. Bhd. v. Liau Shu Chau (trading as Syarikat Maju Jaya Agency)* [1993] 1 AMR 9:779; [1993] 4 CLJ 468 had the occasion to consider the right of a surety against a principal debtor before the surety had paid the debt and the Court there held that declaration will be issued that the principal debtor pays the debt to the creditor. I am also of the view that in this case Chua is entitled to a declaration that Kua and Siau pay the plaintiffs the debt due under the said judgment. But, I am unable to accede to the prayer that Kua and Siau pay the money due under the said judgment to Chua for transmission to the plaintiffs. There is no law to allow such an order and Mr. Ting E. Hang was not able to show the Court any authority that allows the Court to make such an order.

There was actually another issue which should have been argued as a preliminary point but was not and it is the duration of the validity of the third party notice. It will be recalled that the third party notice was issued on 24 March 1992 and only served on 23 March 1994, some two years after it was issued. Mr. Roland Cheng contended that the duration of the said notice, which had been likened to a writ of summons by O. 16 r. 3(3)(a) of the RHC, is only 12 months and that since the said notice was not renewed it had expired almost a year before it was served. It follows, he argued, that all proceedings emanating therefrom are invalid. Mr. Ting E. Hang replied and

argued that there is no limit as to the duration of the said notice and therefore the said notice could be served at any time after it was issued. The relevant part of the prescribed form of a third party notice (Form 22) reads:

> ....
>
> To..... of .....
>
> Take notice that this action has been brought by the plaintiff against the defendant. In it the plaintiff claims against the defendant (state the nature of the plaintiffs claim) as appears from the writ of summons (or originating summons) a copy whereof is served herewith (together with a copy of the statement of claim).
>
> The defendant claims against you (state the nature of the claim against the third party as for instance to be indemnified against the plaintiff's claim and the costs of this action or contribution to the extent of (one half) of the plaintiff's claim or the following relief or remedy namely ... on the grounds that (state the grounds of the claim)).
>
> And take notice that if you wish to dispute the plaintiff's claim against the defendant, or the defendant's claim against you, an appearance must be entered on your behalf within 8 days (or if the notice is to be served out of the jurisdiction insert the time for appearance fixed by the order giving leave to and the defendant's against you and your liability to (indemnify the defendant issue the notice and serve it out of the jurisdiction) after the service of this notice on you, inclusive of the day of service, otherwise you will be deemed to admit the plaintiff's claim against the defendant or to contribute to the extent claimed or to ... stating the relief or remedy sought) and will be bound by any judgment or decision given in the action, and the judgment may be entered against you in accordance with O. 16 of the Rules of the High Court 1980 ...

According to the third party notice, just reproduced, if Kua and Siau had not entered appearance after being served with the third party notice, they would be deemed to admit the plaintiffs' claim against Chua. But in this case, it does not matter because the plaintiffs' claim is not in issue here since the plaintiffs had also obtained judgment against Kua and Siau on 8 April 1992 in the same action in which Chua was sued jointly and severally with them. This still does not answer the question as to whether the said third party notice ought to have been served on Kua and Siau before judgment was entered against Chua on 3 August 1992. The answer, I am of the opinion, is in the warning of the third party notice which says: "if you wish to dispute the plaintiffs' claim against the defendant" which, I think, indicates that it must be served on Kua and Siau, in good time to allow them to consider whether they want to defend the action of the plaintiffs against Chua. It is stated in the **White Book 1985** at p. 234, para. 16/4/3, that the application for third party directions, which comes into play after the service of the third party notice and after the third party had entered appearance, "should be made at a stage of proceedings when it is possible there may still be a trial of the action between plaintiff and defendant ... but directions may be given after judgment against the defendant ...". This appears to support my conclusion that the third party notice ought to have been served before judgment was entered against Chua so that the question of the validity of the claim of the plaintiffs against Chua, if contested by Kua and Siau, could be litigated in one and the same action by the giving of the necessary third party directions. Since judgment was entered by the plaintiffs against Chua before Chua served the third party notice on Kua and Siau, it means that Kua and Siau *quoad* Chua could still relitigate the validity of the claim of the plaintiffs against Chua. This is precisely what the third party proceedings seek to avoid and this is what **Halsbury's Law of England**, 4th Edn., Vol. 37, para. 254 says about the objects of third party procedure, *viz*:

> The objects of third party procedure are to prevent multiplicity of actions and to prevent the same question being tried twice with possibly different results.

In any event, if Kua and Siau had felt the third party proceeding was inappropriate they should have asked for the dismissal of the application of Chua for third party directions and the termination of the third party proceedings under O. 16 r. 4(3)(c) of the RHC at the hearing on 22 April 1994, but they, instead, agreed to the continuation of the proceedings which resulted in third party directions being given relating, *inter alia*, to the delivery of pleadings. It must be

borne in mind that on 8 April 1992, the plaintiffs had already obtained judgment against Kua and Siau on the very guarantee which Chua had also signed and in the very same action which Chua had been sued. By that time too, and in fact after they were served with the writ, Kua and Siau were aware that Chua was also sued in the same action as a co-guarantor. Given the background which I have just set out, Kua and Siau must be taken to have agreed to the third party proceedings and were aware of the action by the plaintiffs against Chua. The termination of the third party proceedings at this stage by the dismissal of the application for summary judgment would result in the parties being engaged in another action which Chua will surely launch. A lot of the Court's time would have been wasted. In the end, what has to be decided is the validity of the claim for indemnity by Chua against Kua and Siau and not the judgment which the plaintiffs had obtained against Chua which Kua and Siau are not disputing. I am of the view that, given the circumstances of this case, the third party notice cannot now be dismissed. This leaves the final question of whether a third party notice can be equated to a writ and thus has a validity of only twelve months. Mr. Roland Cheng had, as mentioned earlier, referred to O. 16 r. 3, which reads:

3. (1) The order granting leave to issue a third party notice may contain directions as to the period within which the notice is to be issued.

(2) There must be served with every third party notice a copy of the writ or originating summons by which the action was begun and of the pleadings (if any) served in the action.

(3) Subject to the foregoing provisions of this rule, the following provisions of these rules, namely, O. 6, r. 6(3), O. 10 (except rule 1(4), O. 11, O. 12 and O. 70, r. 3, shall apply in relation to a third party notice and to the proceedings begun thereby as if:

(a) the third party notice were a writ and the proceedings begun thereby an action; and

(b) the defendant issuing the third party notice were a plaintiff and the person against whom it is issued a defendant in that action.

Mr. Roland Cheng argued that this provision has the effect of turning the third party notice into a writ and thus the twelve months validity period prescribed by O. 6, r. 7(1) applies. On the other hand, Mr. Ting E. Hang argued that the operation of O. 6 r. 7(1) had been expressly excluded when O. 16, r. 3 (3) stipulates that only r. 6(3) of O. 6 is to apply. I am of the view that if the words "the third party notice were a writ" in O.16, r. 3(3) are intended to have the effect of turning a third party notice into a writ and thus make all the provisions, including the 12 months validity period, applicable to a third party notice, O. 16 r. 3 would not have been worded to say that only O. 6, r. 6(3) should apply instead of all the rules of O. 6. By expressly providing r. 6(3) of O. 6 only to apply, it must have been intended that the rest of the rules of O. 6 are not to apply. In this regard, the third party notice is a writ only for the purposes of being assigned a serial number, of being sealed and dated in so far as the application of O. 6, r. 6(3) is concerned. The words of O.16, r. 3 must be taken to be used correctly and exactly (see **Halsbury's Laws of England**, 4th Edn., Vol. 44, at para. 867) with the result that only the provisions of r. (6)(3) and no other rules of O. 6 apply. Similarly, it is only for the purposes of O. 6, r. 6(3), O. 10 (except r. 1(4)), O. 11, O. 12 and O. 70, r. 3 that the third party notice is to be regarded as a writ and the parties therein as the plaintiff and the defendant. Therefore, I am of the view that the 12 months validity period prescribed by O. 6 r. 7(1) has no application to a third party notice. This means that a third party notice has no period to limit its validity. Of course, as I have said earlier, the objects of third party procedure make it necessary for the third party notice to be served in time to enable a third party to defend a plaintiff's action against the defendant if a third party so desires and a third party proceeding can be terminated at the hearing of the application for third party directions if it should appear by then that the objectives of third party procedure are not served by the continuation of the third party proceeding and in this sense only, the third party notice has a limited life span.

Since Kua and Siau had not been able to show why judgment should not be entered against them and since the indemnity is not disputed, I order that Kua Nam Kiang and Siau Fung Oi jointly and severally indemnify Chua Chun Eng and keep Chua Chun Eng indemnified against the

plaintiffs' claim in the action Suit No. T.17 of 1991 (In the High Court in Borneo at Tawau) by paying to the plaintiffs the amount due under the judgment which the plaintiffs have obtained against Chua Chun Eng on 3 August 1992 in the sum of RM4.497,538.41 together with interest thereon at 13% per annum on monthly rest from 1 February 1992 to the date of payment and costs or such other amount as remaining due under the judgment. There will be liberty to Chua Chun Eng to apply in the event that this order is not complied with by Kua Nam Kiang and Siau Fung Oi. The claim for an indemnity for costs is not allowed because Kua and Siau were not given the opportunity to decide whether to defend the action of the plaintiffs against Chua. It is also for the reason that the action ought not to have been defended by Chua in view of the summary judgment obtained by the company against him that I disallow the prayer for indemnity for costs in Chua's defence of the plaintiffs' action. There will be costs for Chua to be taxed.